

The USA PATRIOT ACT: Security or an Assault on Civil Liberties

An Honors Thesis (HONRS 499)

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A handwritten signature in black ink that reads "Ralph Baker". The signature is written in a cursive style with a long horizontal line extending to the right.

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Abstract:

In response to the terrorist attacks on September 11, 2001, the United States Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (USA PATRIOT ACT) Act on October 25, 2001. Its objective was to reduce and prevent as well as improve the response to terrorist acts. It also aims to track down terrorists and apprehend them. This paper examines this piece of legislation from a civil liberties point of view and attempts to examine the possible violations of civil liberties that could occur as a result of this legislation. In order to accomplish this, I give a brief discussion of civil liberties and examine how certain controversial sections of this piece of legislation may erode each one.

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-I want to thank Dr. Ralph Baker for advising me through this project. His guidance helped me to choose this topic and helped me to organize my discussion of it.

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-I finally want to thank God that this thesis is finished.

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Introduction:

There is no question that the terrorist attacks of September 11, 2001 changed the American way of life. On this so-called ‘Second Day of Infamy,’ terrorist hijacked American commercial airliners and proceeded to use them as weapons by crashing them into the World Trade Center and the Pentagon. The attacks killed thousands and devastated the American people. It was the first time since Pearl Harbor that the United States was attacked by a foreign enemy on its own soil. As a direct result to these attacks, the Congress of the United States of America passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” (USA PATRIOT ACT) Act on October 25, 2001. This took place a mere forty-five days after the attacks. Although the act passed with a 98-1 vote in the Senate (Wisconsin Democrat Russell Feingold providing the sole vote against the original PATRIOT Act), it has become quite a controversial piece of legislation. With the reauthorization of the sections doomed to “sunset,” (sixteen provisions were given a “sunset” date of December 31, 2005 at which point they were subject to Congressional review and reauthorization - most Republicans would like to permanently approve these provisions as they are written, while a small coalition favors changes to these and other provisions of the act) debate began to pick up on this issue once again. On March 9, 2006, the United States Congress reauthorized the USA PATRIOT Act with few changes. The most important change that was made to

the act was that a new sunset date of December 31, 2009 on Section 205, 206, and the “lone wolf provision” which applies to the Foreign Intelligence Surveillance Act (FISA).¹ Even with this new extension of the PATRIOT Act, however, debate is far from over. At the heart of this debate is the issue of ensuring national security against the terrorist threat versus the preservation of the Bill of Rights and civil liberties.

To begin discussion of the PATRIOT Act, one must first examine and understand what the PATRIOT Act does exactly and the areas it covers. This, in and of itself, has become a major point of controversy. As a result of the massive scope of the PATRIOT Act, an examination of some of the most controversial issues surrounding this piece of legislation will be given along with some general insight into the broadness of scope of the act. To fully understand the issues at hand and the points of controversy of the PATRIOT Act, a brief discussion of civil liberties, since this is the basis for much of the debate about this piece of legislation, will also need to be entered into. Next, an examination of some of the debate that is occurring in the United States as a result of the PATRIOT Act will be presented. This will be followed by a discussion of some of the most recent occurrences and developments concerning this piece of legislation. Finally, discussion of the USA PATRIOT ACT will end with a discussion of some of my personal thoughts on the issues and some future possibilities of this piece of legislation.

USA PATRIOT ACT:

The original USA PATRIOT ACT is over three hundred forty pages in length. Its one thousand sixteen sections amended more than fifty federal statutes, including the Bank Secrecy Act of 1970 (BSA), the Foreign Intelligence Surveillance Act

(FISA) of 1978, the International Emergency Powers Act, The Trade Sanctions Reform and Export Enhancement Act of 2000, Title 18 of the United States Code, and the Federal Rules of Criminal Procedure. It covers everything from enhanced surveillance, intelligence and security procedures to money laundering to investigating terrorism to providing grants for victims.² As a result of its length, it is difficult to fully comprehend and discuss every part and ramification this piece of legislation has had, will have, and could potentially have on American life and civil liberties. In spite of its length, however, it was conceptualized, constructed, and passed almost unanimously through both houses of Congress in a month and a half with virtually no debate. This is a common occurrence, however, in times of crisis, war, and tragedy. In a crisis situation, there is no doubt that some of the hurdles of our legislature need to be temporarily removed in order to ensure security and protection of our nation and its citizens. However, these temporary restrictions are rarely as permanent as the PATRIOT Act and are generally considered bad governing. An excellent example of this is the Espionage Act of 1917. This act was passed a short time after the United States entered into World War I. Congress passed this act “at the urging of then United States President Woodrow Wilson, who feared and widespread dissent in time of war constituted a real threat to an American victory.”³ The act states “...whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag...or the uniform of the Army or Navy of the United States, or any language intended to bring the form

of government...or the Constitution...or the military or naval forces...or the flag...of the United States into contempt, scorn, contumely, or disrepute...or shall willfully display the flag of any foreign enemy, or shall willfully...urge, incite, or advocate any curtailment of production in this country of any thing or things...necessary or essential to the prosecution of the war...and whoever shall willfully advocate, teach, defend, or shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or imprisonment for not more that twenty years, or both....”⁴ Luckily, the majority of this act was repealed in 1921. If the act hadn’t been repealed, anyone who talked badly or disagreed with the position or actions of the government and voiced their opinion in opposition, would be considered a criminal and could be fined, imprisoned, or both. If this act had not been repealed, the First Amendment’s rights to freedom of speech and press would be virtually nonexistent in times of war. In times of crisis, Presidential and Congressional powers tend to become more centralized and expansive as civil liberties take a back seat. National security becomes the overriding value in times like these. Times of crisis create an anomaly in the legislative process. Instead of the usual, incremental process of making law, the process is sent into hyper-drive and the results are not always desirable. In the normal legislative process, the checks and balances of the different branches of government work to ensure proper debate, consideration of issues, and slow, incremental expansion of powers and responsibilities. In a time of crisis, however, the legislative process becomes streamlined. Citizens demand a response from their legislators and thus, acting on a

mandate from the population, obstacles such as partisan politics, the presidential veto, and judicial review are thrown aside to speed the response along the way. It is only after we are given time to step back and realize what we have done that some of the pitfalls of this type of legislation become apparent. As the editors of *Esquire* magazine wrote, "If there is one thing that always comes out of a terrible tragedy, it is really dumb legislation."⁵ Critics realize this with respect to certain parts of the PATRIOT Act. As scholars begin to examine the PATRIOT Act with further scrutiny and having the benefit of partially recovering from the shock of the tragedies that occurred on September 11, 2001, Americans have begun to realize some of the major pitfalls of the PATRIOT Act. The fact of the matter is that by expanding Presidential powers, speeding up and removing barriers in criminal proceedings, allowing for increased and easier surveillance, and instituting some of the financial/data collecting provisions of the PATRIOT Act, our civil liberties are being infringed upon. The civil liberties that make the United States a free country, the civil liberties that guarantee our basic human rights, are being eroded by the provisions of the PATRIOT Act. However, having said this, it is necessary to realize that this piece of legislation does contain provisions that are essential tools in the fight against terrorism and the protection of the United States of America. The majority of this piece of legislation is widely considered to be well written. For example, Title III of the legislation deals with how to crack down and investigate money laundering. This section is an essential part in the fight against terrorism. If the government cannot track and squeeze the financial pipelines of terrorist organizations, they will never be able to defeat them. Also, Title IV of the act deals with protecting the borders of the

United States. It details new procedures and authorizes overtime to ensure that the nation's borders are being monitored around the clock. Another provision contained in the legislation is a clause that details how to improve nationwide communications in the event of a terrorist attack. Finally, Title VI of the act deals with "Providing for Victims of Terrorism, Public Safety Officers, and Their Families."⁶ It is also beneficial to keep in mind that legislation is constantly being reviewed and revised. The Constitution of the United States has been revised and amended multiple times. There are signs that this same process is beginning to occur with regards to the USA PATRIOT Act. As long as debate continues, the Patriot Act is still in this process of maturation and metamorphosis. New safeguards and checks and balances are still being initiated and added to the bill to help slow, if not stop the erosion of civil liberties. Another point to keep in mind is that many proponents of this piece of legislation feel that ample safeguards are in place to protect against violations of civil liberties. They contend that, though certain areas of civil liberties may be slightly encroached upon, these concessions are necessary in order to prevail against terrorism. They also feel that there are protections built in to the legislation that will discourage or eliminate abuses.

Civil Liberties Tradition:

The concept of civil liberties is the very foundation that our country is built upon. They are at the heart of the War for Independence and the Constitution of the United States. Civil liberties are the "certain unalienable rights" that the Declaration of Independence speaks of. They are broadly outlined in the Bill of Rights and supported by the Fourteenth Amendment (which made the Bill of Rights applicable to

states through a process called incorporation). Concepts included under the civil liberties umbrella are the right to privacy, protection against unreasonable searches and seizures, procedural and substantive due process of law, protection against cruel and unusual punishment, and the right to a fair and speedy trial by a jury of your peers. Enactment of unchanged portions of the PATRIOT Act erodes, if not tramples on, all of these rights. Although a majority of the PATRIOT Act is widely accepted as valid, necessary legislation, a small portion of the provisions it contains are in desperate need of revision in order to balance the scales between national security and civil liberties. In order to clearly identify the ramifications of this controversial piece of legislation, an understanding of the individual civil liberties listed above must be mastered.

The right to privacy, a controversial issue in and of itself due to the fact that it is found nowhere in the written language of the Bill of Rights (or the Constitution for that matter), is widely accepted to exist and has been upheld by the Supreme Court of the United States (it is at the root of the *Roe v. Wade* landmark decision). It recognizes the fact that people should be afforded some privacy in their personal affairs (as long as these affairs don't violate any laws and/or cause a 'public nuisance') and is partially based upon the Fourth and Ninth Amendments.

Protection against unreasonable searches and seizures is guaranteed by the Fourth Amendment to the Constitution of the United States. The Fourth Amendment states that people have the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." (Bill of Rights) It goes on to say that this right "shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (Bill of Rights). This protection has been upheld by the Supreme Court and is the basis for the Miranda Warnings (the mandatory advisement of one’s rights before interrogation begins – e.g. the right to remain silent, the right to an attorney, etc.), the Exclusionary Rule (the clause that prohibits the admittance of any evidence that was obtained illegally and/or without a proper warrant), and many of the other rights that regulate criminal proceedings.

Procedural and substantive due process of law is guaranteed by the Fifth and Fourteenth Amendments, but also has a basis in many of the other amendments found in the Bill of Rights. Procedural and substantive due process of law are closely related and intertwined with the civil liberties mentioned above. It ensures that the proper procedures are followed throughout criminal proceedings and that laws are not written in violation of the Constitution. “Procedural due process is essentially based on the concept of procedural fairness. As a bare minimum, it includes an individual’s right to be adequately notified of charges or proceedings involving him, and the opportunity to be heard at these proceedings. In criminal cases, it ensures that an accused person will not be subjected to cruel and unusual punishment. In the United States, criminal prosecutions and civil cases are governed by explicit guarantees of rights under the Bill of Rights and as incorporated under the Fourteenth Amendment to the States. Due process provides a minimum floor of protection to the individual that statutes, regulations, and enforcement actions must at least meet (but can exceed), in order to ensure that no one is deprived of *life, liberty, or property* arbitrarily and without opportunity to affect the judgment or result. This

minimum protection extends to all government proceedings that can result in an individual's deprivation, whether civil or criminal in nature, from parole violation hearings to administrative hearings regarding government benefits and entitlements to full-blown criminal trials. In criminal cases, many of these due process protections overlap with procedural protections provided by the Eighth Amendment to the United States Constitution, which guarantees reliable procedures that protect innocent people.”⁷

Protection against cruel and unusual punishment is guaranteed by the Eighth Amendment to the Constitution of the United States. Although it may seem straight forward, it can be expanded (as the courts see fit) to protect against many actions the government may undertake.

The First Amendment guarantees certain freedoms to all. It states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances” (Bill of Rights).

Finally, the right to a fair and speedy trial by a jury of one's peers is guaranteed by the Sixth Amendment. This right is also covered under the umbrella of due process of law. Of all the civil liberties listed, this one is the most straight forward and easiest to grasp. It means exactly what it says.

Now that a discussion of the concepts covered and protected by civil liberties has been mastered, the PATRIOT Act can begin to be dissected and an examination of how certain provisions infringe upon and erode these individual freedoms can be

presented. It is also possible to begin to understand why there is so much controversy and debate that surrounds portions of this piece of legislation.

Civil Liberties Problems with the USA PATRIOT Act:

The sections of the PATRIOT Act that have caused the most controversy and have thus received the most attention are sections 206, 211, 213, 214, 215, 218, 411, 412, 505, and 802 (see attached: Table 1). First, a brief discussion of the general language and provisions of each section will be laid out. This will be followed by a discussion of the debate and controversy surrounding each section. At the same time, a discussion of each section's bearing on our individual civil liberties will occur.

Section 206 of the USA PATRIOT Act adds a provision to the Foreign Intelligence Surveillance Act (FISA) that allows for "roving wiretaps." A roving wiretap is a creation that closes the gap between technology and law enforcement agencies. "In short, the introduction of both cellular phones and e-mail created new challenges to the ability of public authorities to conduct communications intercepts, even if they were fully authorized by a court...."⁸ In the days before cellular phones and e-mail, most people only used one phone, and the location was readily identifiable. Now, however, cell phones are so cheap they are disposable and e-mail crosses jurisdictions. Roving wiretaps allow public authorities to specify a person to be "tapped" and thus can intercept communications from any device that person may use or come in contact with. The wiretaps follow persons and not specific communications devices. The main points of debate and controversy involving this section of the PATRIOT Act do not necessarily involve the roving wiretaps, themselves (they are widely accepted as a way to improve intelligence and bridge the

gap between technology and public authorities). The main points of debate and controversy involving Section 206 deal with the belief that the roving wiretaps are “effectively being exercised in an overly broad manner that extends beyond the authorizing basis.”⁹ Under this section, FISA roving wiretaps are permitted in all intelligence investigations. However, unlike criminal roving wiretaps (governed by Title III criminal investigations), these FISA roving wiretaps “do not need to specify target and agents need not ascertain [that the] target is using that telephone [or communication device].”¹⁰ Also, “Under normal Title III intercepts, anyone whose communications have been intercepted has to be notified after the fact that this has happened. Under FISA, people do not have to be notified unless evidence obtained through the interception is to be used against them in court.”¹¹ Another point of controversy is that “Initially, FISA was limited to investigations for which foreign intelligence was the sole purpose. The USA PATRIOT Act modifies FISA so that foreign intelligence need be only a ‘significant purpose’ of an investigation” thus lowering the bar for public authorities.”¹² Because of this, authorities can investigate whomever they please as long as it has some connection to foreign intelligence (even if that connection is that you have a coworker who is a citizen of another nation). Also, “When lawyers use FISA evidence in court, it is difficult for the defendant to challenge it because he or she cannot see the information that the agents relied on in making the application for surveillance – this is secret for national security reasons.”¹³

Thus, in one small section, the rights to privacy, protection against unreasonable searches and seizures, due process of law, and the right to a fair and speedy trial have been eroded. The right to privacy has been eroded in that public

officials may now be able to wiretap a public computer or phone that an innocent American citizen (one that is not a target of investigation for terrorist activity) may use and listen to his or her conversations. On top of that, he or she may be totally unaware of this intrusion due to the fact that the authorities only have to notify the party if they plan to use it in court. Protections against unreasonable searches and seizures have been eroded in that the bar has been lowered for public officials to conduct these activities. Finally, due process of law and the right to a fair and speedy trial have been eroded in that individuals are not afforded the ability of a total defense. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to...be informed of the nature and cause of the accusation; to be confronted with the witnesses against him...." The fact that someone prosecuted under this section of the PATRIOT Act is not allowed to interview or be made aware of the processes that led up to him or her being named a suspect is a blatant disregard of this part of the Sixth Amendment. This means that the defendant is not provided with access to all of the evidence and/or proceedings that the prosecution has in its possession, specifically, "...the information that agents relied on in making the application for surveillance...."¹⁴

Section 211 is also a point of controversy concerning the USA PATRIOT Act. Included in this section is a provision that "adds twenty-five death penalties and would allow the death penalty for attempting and conspiring to commit terrorism crimes."¹⁵ Although there isn't a public outcry to alter this section (not many Americans, in the wake of 9/11, would lose sleep over a terrorist being put to death – in fact, many would sleep more easily), a mental note must be made that the ultimate

goal is good legislation and the protection of basic human rights (i.e. our nation's civil liberties). With this in mind, it is easy to see that this provision "raises significant constitutional concerns: sentencing a person to death for a crime of attempt and conspiracy would also most certainly be found to violate [the] Eighth Amendment."¹⁶ As *Coker v. Georgia* states, "The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e.g., treason, airplane hijacking, and kidnapping." As you can see, the crimes of conspiracy and attempt fall in line with the ruling of the court. These crimes do not result "in the death of victim."¹⁷

Section 214 goes hand in hand with Section 211. "Section 214 of the legislation would allow the government to impose the death penalty even if the defendant had no intent to kill or to act in reckless disregard of human life as required by 18 USC 3591(a)(1). This federal statute governs almost all other federal death penalty crimes and currently requires the government to prove that the defendant either intended to cause death or serious bodily injury or acted with extreme indifference to human life, etc."¹⁸ Section 214 effectively eliminates the requirement that the prosecution prove intent. Due to this, this section is believed to be in violation of the Eighth Amendment as well.

Section 214 in conjunction with Section 211 (collectively referred to as Title II of H.R. 3199 – the Terrorism Prevention Reauthorization Act of 2005) stacks the deck in the favor of the government. "Under current federal law, a defendant is given

a life sentence if a jury of twelve of his or her peers does not unanimously agree to the death penalty. It is important to note that all capital juries are ‘death qualified,’ meaning that anyone who opposes the death penalty on moral, religious, or practical grounds is excluded. Thus, under current law, prosecutors already have a great ability to influence the jury to impose the death penalty. Under H.R. 3199, if the defendant’s first sentencing jury does not reach a unanimous recommendation for death, the prosecutor can impanel a succession of new juries until he or she can convince one of them to unanimously vote for the death penalty. If prosecutors are permitted to impanel multiple sentencing-phase juries, it could result in a person receiving a death sentence even after the majority of the jurors that sat through the trial voted for a sentence of life in prison.”¹⁹ Furthermore, provisions of Title II also “permit a judge to reduce the size of a sentencing jury to fewer than twelve for ‘good cause,’ with no minimum number set. This would further erode the protections of the jury system – an institution that is designed to reflect the conscience of the community and to stand between the state and the accused.”²⁰

One can see, these two sections of the USA PATRIOT Act, from a civil liberties point of view, endanger the civil liberties spelled out in the Bill of Rights, specifically the Eighth Amendment’s protection against cruel and unusual punishment, the Sixth Amendment’s right to a fair and speedy trial, and the Fifth Amendment’s protection against double jeopardy (in essence the prosecutor is repeatedly trying a person on the same crime in order to receive a death sentence).

Section 213 of the USA PATRIOT Act deals primarily with searches and seizures. Sometimes referred to as the “sneak and peek” provision, this section

“provides statutory authority for sneak and peek searches under wide-ranging circumstances, including whenever notice could ‘seriously jeopardize’ a prosecution.”²¹ This section “empowers the FBI to conduct searches in criminal investigations, however minor the crime, without notifying the targets of the searches until weeks or even months later.”²² Simply stated, Section 213 “allows law enforcement agencies to conduct secret searches of anyone’s home or apartment without a warrant or even notification to the owner. This means that investigators could potentially enter anyone’s place of residence, take pictures, download computer files and seize items without informing them of the search until days, weeks, or even months later.”²³ In addition to this, a “‘catch-all’” provision contained in the USA PATRIOT Act gives permission to use this power “in virtually any criminal investigation that the government deemed fit [no matter how minor the offense] without any sort of significant judicial oversight.”²⁴

Section 213 of the USA PATRIOT Act seems, most definitely, to be a violation of American civil liberties. It may violate the right to privacy by allowing law enforcement officials to enter a person’s private domain and confiscate his or her personal belongings (i.e. computer files, books, pictures, etc.). It also can also be considered to be in violation of procedural due process of law; wherein, an officer of the law must prove to a magistrate that a search is warranted and receive permission to conduct the search (see also the Fourth Amendment to the Constitution of the United States of America). By this same standard, Section 213 violates the protection against unlawful searches and seizures. However, in spite of all this, proponents and defenders of these provisions are still afforded a leg to stand on. There are

circumstances that allow for warrantless searches (i.e. DUI, possible destruction of evidence, etc.). This is why debate rages on over this issue. It is also why this section will likely find itself in front of the Supreme Court of the United States in the future.

Section 215 of the USA PATRIOT Act, widely considered one of the most controversial (if not the most controversial) sections of the legislation, “empowers the FBI to obtain records concerning anyone at all, including people who are not suspected of any involvement whatsoever in criminal activity or espionage, and prohibits organizations that are forced to disclose their records from telling anyone else about it.”²⁵ Under this section, law enforcement officials can obtain a court order to secure “any and all ‘tangible things’” in national security terrorism cases without the individual being a suspect of the investigation. Among the “things” that the agency could use Section 215 to obtain are “personal belongings such as books, letters, journals or computers; a list of people who have visited a particular website; medical records, including psychiatric records; a list of people who have borrowed a certain book from the library; a membership list from an advocacy organization like Greenpeace, the Federalist Society, or the ACLU (American Civil Liberties Union); a list of people who worship at a particular church, mosque, temple, or synagogue; a list of people who subscribe to a particular periodical;” and as the “Attorney General himself boasted [at a June 2003 hearing before the House Judiciary Committee]” a federal law enforcement agent could “use the law ‘even to obtain genetic information.’”²⁶ Section 215 also allows for increased surveillance of financial transactions and records. The Bank Secrecy Act of 1970 was amended by Section 215. Section 215 lowers the dollar amount at which banks are required to report the

transactions to the government. Basically, banks are required to file “‘suspicious activity reports’” on transactions totaling five thousand dollars or more “if they have ‘no apparent lawful purpose or are not the sort in which the particular customer would normally be expected to engage in.’”²⁷

This section of the USA PATRIOT Act could possibly be struck down simply for being too vague. How does one define a “tangible thing?” A case could also be made that there is a First Amendment issue present here. As an article by the American Civil Liberties Union points out, “The only thing that Section 215 says about First Amendment rights is that United States citizens and permanent residents can’t be investigated under the provision based ‘solely’ on their exercise of those rights. What this means in practice is that, if you’re a United States citizen [or permanent resident], the FBI can’t obtain your library records or your medical records or your genetic information simply because you wrote a letter to the editor criticizing the war in Iraq. If the FBI wants to investigate you, they need to base the investigation on something else as well – something unrelated to the First Amendment. This doesn’t mean that the FBI has to have probable cause, or that they need to have any evidence at all that you’re engaged in criminal activity. The ‘something else’ could be that you were born in the Middle East, or that you took a trip to Pakistan last year. In fact, the ‘something else’ might even be what one of your friends or associates did, if the FBI thinks that records about you will shed light on that person’s activities. As long as the ‘something else’ isn’t related to First Amendment activity, it can count as a basis for the investigation” the search can be conducted.”²⁸ On top of this, people who aren’t citizens or permanent residents of the

United States aren't even afforded this small amount of protection. "For example, Canadians in the United States on NAFTA visas can be investigated solely because of the books they borrowed from the library, the websites they visited, or the fact that they belong to the Federalist Society or the American Civil Liberties Union."²⁹ The fact of the matter is that this section eliminates the requirement for probable cause that the target was an agent of a foreign power and replaces it with the requirement that the government "assert the information is required for an investigation."³⁰ This essentially molds the role of the court system into a rubber stamp for government action. Instead of having to prove to a court that a person was an agent of a foreign power, investigators can simply say that they need this information on this person for some sort of investigation. The courts' ability to determine if the information is necessary or that probable cause does exist is diminished along with the courts' ability to check the powers of the investigators and protect against possible violations of civil liberties. In some instances, the approval of action by the courts is totally bypassed. Finally, with regard to the financial reporting requirements, "the government claimed the legal right to maintain routine surveillance, without summons, subpoena, or warrant over the details of citizens' financial transactions...., 'In effect, bankers have been drafted as spies and snitches'...., 'The PATRIOT Act is imposing a citizen-soldier burden on the gatekeepers of financial institutions.'"³¹ For these reasons, the authorization of broad surveillance of financial transactions included in Section 215 is accused of "bypassing the Fourth Amendment's normal protections against 'unreasonable searches and seizures'..." and being "an unnecessary breach of privacy."³² In addition to this, even at the higher dollar amount

for required reporting (as required by the BSA and FinCEN), these methods have been widely ineffective (presenting few tangible results) while imposing “tremendous costs on individual privacy and the economy [even before 9/11, the banking industry was estimating compliance costs of ten billion dollars a year (not to mention the amount of tax dollars paid to government officials to sift through the tremendous amount of data and paperwork reported)].”³³

Another section of the USA PATRIOT Act that has been a cause for concern and a point of controversy is Section 218. The original intent of Section 218 was to allow “dual intelligence and law enforcement investigation.”³⁴ In an article written by Lee S. Strickland, a former member of the Senior Intelligence Service in his thirty-year career with the United States government, he says, “Perhaps the most complicated provision [Section 218], its effect was to eliminate the so-called ‘wall’ between law enforcement and intelligence investigations and allow the use of the lower standard intelligence warrants when intelligence and law enforcement purposes are present in a given case and thus criminal prosecutions will likely ensue.”³⁵ Strickland goes on to say, “The concern is that this dual focus will subtly erode the Fourth Amendment criminal standard of probable cause of criminal conduct with the [lower] intelligence standard of ‘agent of a foreign power’ or ‘required’ requirement for certain intelligence orders.”³⁶ From the civil liberties viewpoint, it is quite obvious to see why Section 218 has received attention and has been the cause of debate.

The next two sections of concern, Sections 411 and 802, broadly expand the definition of “domestic terrorism.” Section 802, alone, defines domestic terrorism as

“any state or federal criminal act primarily within [the] U.S. involving ‘acts dangerous to human life’ and that ‘appears to be intended ‘to influence government or civilian populations.’”³⁷ Section 411 provides definitions that relate to terrorism. Things such as what it means to be engaged in terrorist activity, what a terrorist organization is, etc. are covered in this section. This definition of domestic terrorism is so broad that it potentially endangers completely innocent groups that are organized for totally legal purposes. In fact, the definition of “domestic terrorism” is so broadly defined that groups such as Greenpeace, Operation Rescue, and groups of college students engaged in particular types of protest can potentially be labeled “terrorists” for attempting to influence the government or the civilian population. These two sections may be directly in violation of our First Amendment rights. These sections erode the very base that our country was built upon. If Americans are not allowed to peacefully assemble and protest or to voice their opinions in opposition of the government, then we no longer live in a free society. The principles of a democratic form of government are erased. Implementation of this definition of “domestic terrorism” opens too many doors and means that our government is no better than the former rule of the Taliban. We will not be free to question our government any longer.

Section 412 of the USA PATRIOT Act allows the Attorney General to detain aliens for an indefinite period of time. This, along with Section 505 (creation of the power to “demand the credit and banking records of anyone at all, including people who are not suspected of any involvement whatsoever in criminal activity or espionage”³⁸ and placing it in the hands of the Attorney General) greatly expand the

powers of the Attorney General without inserting checks and balances to safeguard against corruption. Also, Section 412 can arguably be found in violation of the Fourth, Fifth, and Sixth Amendments. It violates the Fourth Amendment by violating the right of the people to be “secure in their persons....” It violates the Fifth Amendment by depriving that person of life and liberty. Finally, it violates the Sixth Amendment in that the accused did not stand trial; is not “informed of the nature and cause of the accusation;” is not “confronted with the witnesses against him;” does not have the “compulsory process for obtaining witnesses in his favor;” and is not provided with “the Assistance of Counsel for his defense” (Bill of Rights).

Another common criticism of the Patriot Act and the Bush Administration with regards to the Patriot Act is that Presidential Powers are being expanded too much. Section 106 of the Patriot Act broadly expands Presidential Emergency powers. Basically, it gives the president the power to confiscate property for a great number of reasons and distribute it any way he sees fit. Also, included in Section 106 is a clause that bypasses judicial review of these actions if the president asserts that the confiscation was based on “classified information.” The administration has been accused of taking an extreme view on executive power with regards to the Patriot Act. “President Bush’s instigation of warrantless eavesdropping by the National Security Agency violates the Americans’ Fourth Amendment rights and demonstrates a total disregard for the rule of law.”³⁹ Also, the president is able to “declare an American citizen an ‘enemy combatant.’”⁴⁰ This is troubling because “this status removes many of the constitutional protections afforded to U.S. citizens.”⁴¹

Conclusion:

The USA PATRIOT Act has a handful of problems. It contains provisions that could possibly create problems and erode civil liberties in the United States. However, debate on the issues and provisions of this piece of legislation still rages on. There is certainly no right or wrong opinion on this legislation. I have simply given my personal views on this issue as well as some of the major civil libertarian concerns of the USA PATRIOT ACT. There is, however, no universal agreement on these issues or what (if anything) should be done about them. Both sides of this debate are working to further their cause and are fighting the battle for public opinion. This paper's purpose is simply to inform the American people of some of the provisions that could potentially affect their lives. Time will tell how this issue is resolved. I encourage all peoples to track and research the developments of this piece of legislation for themselves. For more information on this topic visit <http://www.lifeandliberty.gov> (proponent view), <http://www.usdoj.gov> (reports on how provisions have been used), <http://www.aclu.org> (opposed to PATRIOT), or <http://judiciary.house.gov/Printshop.aspx?Section=232> (recent events concerning PATRIOT).

As for future predictions, I believe that Congress will begin to pass measures that further check and limit the powers listed in the USA PATRIOT Act. I believe that the United States Supreme Court will serve as the biggest ally to civil liberties and begin to declare certain parts of this act unconstitutional.

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- ¹ *The Patriot Act: Where It Stands*. 10 April 2006. <<http://www.aclu.org>>.
- ² United States. 107th Congress, 1st Session. *United States Statutes At Large*. Vol. 115, pt. 1. Washington: GPO, 2002.
- ³ "Espionage Act of 1917." *Wikipedia Encyclopedia*. 2005. Wikipedia Encyclopedia. 10 April 2006. <http://en.wikipedia.org/wiki/Espionage_Act_of_1917>.
- ⁴ "The Espionage Act." *Modern History Sourcebook*. Ed. Halsall, Paul. January 1999. 10 April 2006. <<http://www.fordham.edu/halsall/mod/modsbook.html>>.
- ⁵ Iftikhar, Arsalan. *The Human Quest*. July/August 2005. 15 January 2006. <<http://www.aclu.org>>.
- ⁶ United States. 107th Congress, 1st Session. *United States Statutes At Large*. Vol. 115, pt. 1. Washington: GPO, 2002.
- ⁷ "Procedural Due Process." *Wikipedia Encyclopedia*. 2005. Wikipedia Encyclopedia. 10 April 2006. <http://en.wikipedia.org/wiki/Due_process>.
- ⁸ Etzioni, Amitai. *How Patriotic is the Patriot Act?: Freedom versus Security in the Age of Terrorism*. New York: Routledge, 2004. pp. 49
- ⁹ Iftikhar pp. 1
- ¹⁰ American Civil Liberties Union. *SAFE Act: PATRIOT Surveillance Powers Compared*. ACLU, 2005. 15 January 2006. <<http://action.aclu.org/reformthepatriotact/safe.html#table>>.
- ¹¹ Etzioni, pp. 52
- ¹² Etzioni, pp. 52
- ¹³ Etzioni, pp. 52
- ¹⁴ Etzioni, pp. 52
- ¹⁵ Frederickson, Caroline, et al. *Sign-on Letter to USA Patriot Act Senate Conferees Urging Opposition to the Death Penalty Provisions in the House Patriot Act (11/8/2005) Re: Opposing the Death Penalty Provisions in House Patriot, USA Patriot and Terrorism Prevention Reauthorization of 2005*. 15 January 2006. <<http://www.aclu.org>>.
- ¹⁶ Frederickson, pp. 1
- ¹⁷ *Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1977).
- ¹⁸ Frederickson, pp. 1
- ¹⁹ Frederickson, pp. 1
- ²⁰ Frederickson, pp. 1
- ²¹ American Civil Liberties Union, pp. 2
- ²² *Patriot Propaganda: Justice Department's PATRIOT Act Website Creates New Myths About Controversial Law*. 15 January 2006. <<http://www.aclu.org>>.
- ²³ Iftikhar, pp.1
- ²⁴ Iftikhar, pp. 1

²⁵ Patriot Propaganda, pp. 1

²⁶ Patriot Propaganda, pp. 3

²⁷ Berlau, John. Broad Surveillance of Financial Transactions. ACLU, 2005. 15
January 2006. <<http://action.aclu.org/reformthepatriotact/bsa.html>>.

²⁸ Patriot Propaganda, pp. 3

²⁹ Patriot Propaganda, pp. 4

³⁰ Iftikhar, pp. 2

³¹ Berlau, pp. 2

³² Berlau, pp. 1

³³ Berlau, pp. 5

³⁴ Iftikhar, pp. 4

³⁵ Iftikhar, pp. 4

³⁶ Iftikhar, pp. 4

³⁷ American Civil Liberties Union, pp. 3

³⁸ Patriot Propaganda, pp. 1

³⁹ *The Patriot Act: Where it Stands*, pp. 2

⁴⁰ Etzioni, pp. 35

⁴¹ Etzioni, pp. 35

Table 1

<u>Section #</u>	<u>Summary</u>
206	FISA roving wiretaps allowed in all intelligence investigations, but unlike criminal roving wiretaps, FISA roving wiretaps do not need to specify target and agents need not ascertain target is using that device.
211	Expansion of number of crimes eligible for death penalty.
213	Provides for “sneak and peak” searches under a wide variety of circumstances. Does not specify a time limit for delay of notice.
214	Eliminates requirement of prosecution to prove intent.
215	Allows for collection of any and all “tangible things.” This includes library records, medical records, financial records, computer files, etc. Also, prohibits disclosure of occurrence by business to target of investigation.
218	Supposed to eliminate ‘wall’ between intelligence agencies. Allows for lower intelligence standards instead of probable cause.
411	Provides broad definitions for things relating to terrorism
412	Gives authority to Attorney General to detain aliens for an indefinite period of time.
505	Allows for collection of financial records, telephone bills, consumer credit reports, etc. without a court order and without individual suspicion. Expands definition of financial records
802	Broadly defines domestic terrorism/triggers other surveillance powers.

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